

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION

FILED

JASON MYNATT,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

Claims Commission No. 20090792  
Regular Docket

JAN 27 2010

Tennessee Claims Commission  
CLERK'S OFFICE

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CO-COUNTY

2009

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NOTICE SENT

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ORDER GRANTING STATE'S MOTION TO DISMISS  
AND/OR FOR SUMMARY JUDGMENT

**THIS MATTER IS BEFORE** the undersigned on the Defendant's Motion to Dismiss and/or for Summary Judgment and the Record as a whole.

Motions pending before the Tennessee Claims Commission ("the Commission") are to be decided without oral argument pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument. Therefore, the State's Motion is properly before the Commission and will be heard on the record.

**Procedural History.**

This claim was filed with the Division of Claims Administration ("the Division") on January 15, 2009, and transferred to the Commission on April 15, 2009. Subsequently, on July 15, 2009, Mr. Mynatt filed a Notice of Claim to which the State responded with an Answer on August 14, 2009. Thereafter, on November 12, 2009, the State filed a Motion to Dismiss or in the Alternative for Summary Judgment. Mr. Mynatt has not responded to that Motion.

### **Facts.**

On March 9, 2008, the University of Tennessee men's basketball team defeated the men's team from the University of South Carolina, thus winning the Southeastern Conference Championship for that year.

Mr. Mynatt attended that game which was played at the Thompson-Boling Arena on the campus of the University of Tennessee at Knoxville.

Following the victory, Mr. Mynatt alleges that he, along with many other fans, flooded onto the basketball court at Thompson-Boling in an effort to obtain autographs from some of the Volunteer players. He goes on to allege in his claim that as he proceeded along the right side of the court, walking in a northerly direction, his foot caught on the edge of the elevated court surface. According to Mr. Mynatt's claim, the basketball court is elevated to a height of one and one-half inches off the underlying concrete floor. Mr. Mynatt alleges that he sustained a serious injury to his right ankle when his foot caught on the edge of the wooden court.

Mr. Mynatt's situation was immediately addressed by team athletic trainers and, in fact, by Mike Hamilton, the Athletic Director at the University. He was subsequently transported to the University of Tennessee Medical Center Emergency Room and later underwent ankle surgery.

Mr. Mynatt alleges that the University was negligent in the following particulars. First, he asserts that the one and one-half inch differential between the concrete floor and the wooden playing surface is an unnecessary hazard. Secondly, he alleges that folding chairs which had been placed on the court side obscured his view of the one and one-half inch drop off as well as any paint intended to alert individuals walking near court side that the entire area was not one flat expanse. Finally, he alleges that since autograph signing by the victorious Volunteer players was "apparently sponsored and supported by the staff" that the University should have assured the safety of any autograph seekers

who went onto the court. In his claim, Mr. Mynatt prays for damages in the amount of Forty-One Thousand Six Hundred Thirty-Seven and 25/100 Dollars (\$41,637.25).

The Answer filed by the State denies that there was a defective or dangerous condition appertaining at the time and place where Mr. Mynatt fell. The State goes on to assert that any risk created by the nature of the playing surface was not foreseeable and that no notice had been given to a proper state official prior to Mr. Mynatt's injury as required by Tennessee Code Annotated, section 9-8-307(a)(1)(C). Affirmatively, the University alleges that Mr. Mynatt's fault in not observing the area in which he was walking was equal to or greater than any fault which could be attributed to the State and that consequently, Mr. Mynatt's claim should be denied.

The State has now filed a Motion to Dismiss or in the Alternative for Summary Judgment. The Motion to Dismiss under Rules 12.01 and 12.06 of the Tennessee Rules of Civil Procedure asserts that the Commission lacks subject matter jurisdiction and that Mr. Mynatt has failed to state a claim upon which relief can be granted since the State had no advance notice of a defective condition prior to Mr. Mynatt's fall. Alternatively, the State alleges that it is entitled to summary judgment under Rule 56 of the Tennessee Rules of Civil Procedure.

Attached to the State's Motion is the Affidavit of Douglas A. Kose, the Assistant Athletic Director of Sales and Marketing at the University in Knoxville. In that Affidavit, Mr. Kose affies that security at each and every basketball game at Thompson-Boling Arena is provided by ushers, a private security firm, and the University's own police department. A part of the duties of each of these components of the University's security effort, Mr. Kose swears, is to provide protection for the coaches and players following a game, as well as generally securing the court premises. Paragraph 3 of the Affidavit goes on to state that following the victory over the University of South Carolina, arena ushers and the private security firm surrounded the court until the festivities were concluded. The

Affidavit goes on to state that the elevation of the basketball court is clear to anyone approaching or leaving the floor and that the seating around the perimeter of the court had been approved by the fire marshall's office. Finally, Mr. Kose states in paragraph 6 of his Affidavit that there had been no report of a dangerous condition or observed hazard at the location where Mr. Mynatt fell prior to Mr. Mynatt's injury of March 9, 2008.

### **Decision.**

This claim against the State, through one of its agencies, the University of Tennessee, is brought pursuant to the Tennessee Claims Commission Act which is found in Tennessee Code Annotated, sections 9-8-101, *et seq.*

Suits against a sovereign entity, such as the State of Tennessee (and thus, the University), previously were not permitted. This is known as the doctrine of sovereign immunity. The partial waiver of that sovereign immunity, in its current form, dates back to 1984 with the passage of the Tennessee Claims Commission Act, which became effective in 1985.

This Commission has a very limited jurisdiction which represents a partial waiver of the State's innate common law sovereign immunity. Sovereign immunity is a principle of law immunizing a governmental body against suit. It has long been a part of the jurisprudence of every state in the Union. The thought behind the concept is the protection of the government against a wide variety of legal claims which could, without sovereign immunity, cause a state severe financial problems to the detriment of the population as a whole.

The doctrine of sovereign immunity against suit in Tennessee derives from the common-law as it developed in North Carolina and subsequently in this state. *Lucas v. State*, 141 SW3d 121, 125 (Tenn. Ct. App. 2004).

With that principle in mind, the drafters of the Constitution of Tennessee embedded as a paramount principle of governance the concept that only the Legislature of the State could determine those circumstances in which the shield of sovereign immunity would be lowered and suit against the State permitted. Article I, Section 17 of our Constitution provides as follows:

Section 17. That all courts shall be open; every man, for an injury done him and his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered, without sale, denial or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct. (Emphasis supplied.)

The General Assembly itself later enacted statutory law which reiterates the concept of the sovereign immunity of this State. Tennessee Code Annotated, section 20-13-102(a) reads as follows:

20-13-102. Actions Against State Prohibited. – (a) No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state. See also *Brewington v. Brewington*, 387 SW2d 777, 778-779 (1965).

In 1984, as pointed out above, the General Assembly made a significant change to the law of sovereign immunity with the enactment of The Tennessee Claims Commission Act, Tennessee Code Annotated, section 9-8-301, *et. seq.* In Tennessee Code Annotated, section 9-8-307(a)(1), the Legislature set out very clearly those areas in which the State has relinquished its immunity to the financial extent permitted by other provisions of that Act.

An adjunct principle to the State's decision, through its Legislature, to partially waive its sovereign immunity rights is the rule that statutes waiving immunity, because they are in derogation of the common-law, must be strictly construed. *State ex Rel Allen v. Cook*, 106 SW2d 858, 860 (1937); *Stokes v. University of Tennessee*, 737 SW2d 545, 547, (Tenn. Ct. App., 1987).

The Supreme Court has made it abundantly clear that if a particular cause of action is not enumerated in Tennessee Code Annotated, sections 9-8-307, *et seq.*, this Commission does not have jurisdiction since sovereign immunity has been waived only in the areas set out therein.<sup>1</sup> *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

The sorts of claims which may be filed against the State of Tennessee are set out in Tennessee Code Annotated, section 9-8-307. Of those various categories, the subsection which would apply with regard to this claim is found in Tennessee Code Annotated, section 9-8-307(a)(1)(C), which provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions Transfer of claims.**

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

... (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;

In order to prevail on a claim under this subsection, the Claimant must show that his or her injury was created by a foreseeable risk and secondly, that the State had advance notice of the risk with sufficient time to afford it an opportunity to take appropriate measures to address the condition. Of course, Claims Commission decisions are also guided by traditional common law tort concepts of “duty and the reasonably prudent person’s standard of care” which have been adopted in Tennessee. (See Tenn. Code Ann. § 9-8-307(c).)

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<sup>1</sup> Briefly, the Commission did have jurisdiction of cases involving alleged negligent deprivation of constitutional rights. However, in 1989, the words “or constitutional” were deleted from Tennessee Code Annotated, section 9-8-307(a)(1)(N). See *Shell v. State*, 893 S.W.2d 416, 418-420 (Tenn. 1995).

Here, the State has filed motions to dismiss under rules 12.02(1) and (6), which provide respectively as follows:

**12.02. How Presented.** – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, ... (6) failure to state a claim upon which relief can be granted,....

The standards for granting motions to dismiss under rules 12.02(1) and (6) are respectively as follows:

Rule 12.02(1)

Subject matter jurisdiction involves a tribunal's power to adjudicate a particular controversy brought before it. ... Tribunals such as the Commission derive their subject matter jurisdiction from the Constitution of Tennessee or from legislative act, ... and cannot exercise jurisdictional powers that have not been conferred directly on them expressly or by necessary implication. ... A tribunal's subject matter jurisdiction in a particular circumstance depends on the nature of the cause of action and the relief sought. (*Cavnar v. State*, No. M2002-00609-COA-R3-CV, 2003 WL 535915, \*2 (Tenn. Ct. App.), Emphasis Supplied.)

Rule 12.02(6)

A Rule 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the sufficiency of the complaint, not the strength of a plaintiff's proof as does, for example, a motion for a directed verdict. *Merriman v. Smith*, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979). The failure to state a claim upon which relief can be granted is determined by an examination of the complaint alone. *Wolcotts Fin. Serv., Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). The basis for the motion is that the allegations contained in the complaint, considered alone and taken as true, are insufficient to state a claim as a matter of law. *Cornpropst v. Sloan*, 528 S.W.2d 188, 190 (Tenn.1975); *Shelby County v. King*, 620 S.W.2d 493, 494 (Tenn.1981); *Shipley v. Knoxville Journal Corp.*, 670 S.W.2d 222, 223 (Tenn.Ct.App.1984). The motion admits the truth of all relevant and material averments contained in the complaint but asserts that such facts do not constitute a cause of action. *League Cent. Credit*

*Union v. Mottern*, 660 S.W.2d 787, 789 (Tenn.Ct.App.1983). In scrutinizing the complaint in the face of a Rule 12.02(6) motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact therein as true. *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848-49 (Tenn.1978); *Holloway v. Putnam County*, 534 S.W.2d 292, 296 (Tenn.1976). The motion should be denied unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Fuerst*, 566 S.W.2d at 848. (*Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934.)

Alternatively, the State has requested summary judgment under Rule 56 of the Tennessee Rules of Civil Procedure which, in pertinent part, provides as follows:

**Rule 56.04. Motion and Proceedings Thereon**

The motion shall be served at least thirty (30) days before the time fixed for the hearing. The adverse party may serve and file opposing affidavits not later than five days before the hearing. Subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages. (Tenn. R. Civ. P., 56.04.)

When a motion to dismiss has attached to it Affidavits and other forms of supporting documents, it is converted to a motion for summary judgment. (Tenn. R. Civ. P., R. 12.02(6).)

Since in this case, the Affidavit of Mr. Kose is attached to the State's Motion, the Commission will consider the Motion now before it as one requesting summary judgment.

The Tennessee Supreme Court has recently set out a succinct explanation of the summary judgment process:

The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue



as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn.2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn.2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn.1998). If the moving party fails to make this showing, then “the non-movant’s burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.” *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party’s claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 5 (Tenn.2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n. 5. Both methods require something more than an \*84 assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party’s ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party’s claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn.2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

(1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

*McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n. 6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Martin v Norfolk Southern Railway Company*, 271 S.W.3d 76, at 83-84. (Emphasis supplied.)

#### **Decision on Merits of Claim.**

In this case, the State defends on the basis of a lack of subject matter jurisdiction of this claim as well as an alleged failure by the Claimant to state a claim upon which relief can be granted. The State has filed a Motion to Dismiss as well as a Motion for Summary Judgment. Since the Affidavit of Mr. Kose was attached to the State's Motion, for all intent and purposes, the State's Motion is one for summary judgment.

The Commission has discussed above at some length recent case law interpreting the Tennessee Rules of Civil Procedure in the area of summary judgment motions. The Tennessee Rules of Civil Procedure, with some minor variations not applicable here, are applied in cases before the Tennessee Claims Commission. (See Rules of the Tennessee Claims Commission, Rules 0310-1-1-.01 and 0310-1-1-.01(5).)

Here, Mr. Mynatt's claim alleges negligence in several different areas. First, he alleges that the University was negligent with regard to the crowd control measures it took following the University of Tennessee's victory over the University of South Carolina. Secondly, Mr. Mynatt alleges that the

University was negligent in elevating the playing surface of Thompson-Boling Arena some one and one half inches off the concrete ground flooring. Next, Mr. Mynatt alleges that the placement of folding chairs around the perimeter of the playing surface obscured any paint, or other warning measures, which the University may have taken to advise those in proximity to the court of the one and one half inch differential.

To rebut those allegations, the University has provided the sworn affidavit of Mr. Kose stating that following the game, the court area was surrounded by ushers, representatives of the private security firm, as well as University of Tennessee campus police. Mr. Kose's Affidavit goes on to state that the slight one and one half inch elevation of the playing surface was visible to all persons and that the seating courtside for players, coaches, and other individuals involved in the presentation of the game, had been approved by the fire marshall. Finally, Mr. Kose alleges that the University had received no reports of a dangerous condition in connection with the configuration of the court.

In the face of this sworn Affidavit, Mr. Mynatt "may not rest upon the mere allegations ... of his [notice of claim], but his response or her response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial". Failing presentation of such materials, "summary judgment, if appropriate, shall be entered against the adverse [non-responding] party". (Tenn. R. Civ. P., Rule 56.06.)

Mr. Mynatt has not refuted these allegations thereby creating a "genuine issue" of material fact. (Tenn. R. Civ. P., Rule 56.04.)

The statements contained in Mr. Kose's Affidavit address the two requirements found in Tennessee Code Annotated, section 9-8-307(a)(1)(C), - (1) foreseeability of the alleged risk, and (2) notice to a proper state official with sufficient time for the University to have been afforded an opportunity to address the situation.

Obviously, what the University is contending is that because of the fact that it had in place numerous individuals around the court following the victory; that it had never received any reports of the court creating a dangerous condition; that it had the fire marshall inspect the premises and approve the appropriateness of the seating arrangements around courtside; and that the court itself was visible to anyone looking at it, therefore, that it was not foreseeable to it that Mr. Mynatt's accident would occur. Additionally, the University has provided sworn testimony that it had received no prior notification of a problem with the way the playing surface of Thompson-Boling Arena was configured.

The Claimant has not submitted any materials which contradict these statements by the University.

The *Martin v. Norfolk Southern Railway Co.* case, quoted extensively above, restates our Supreme Court's recent holding in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008) that a party moving for summary judgment may shift the burden of creating a material issue of fact to its opponent by either: (1) "affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial". *Id.* at 8.

The materials now before the Commission establish that the University has negated Mr. Mynatt's contention, under Tennessee Code Annotated, section 9-8-307(a)(1)(C), that it was foreseeable to the University that the condition of the court at the time of his fall would cause that fall. Mr. Kose's sworn, un-refuted Affidavit shows that the University had implemented several measures to insure the safety of attendees at the UT/South Carolina game.

Secondly, the University has affirmatively shown that it did not have advance notice of this allegedly dangerous condition within sufficient time to have taken further steps to remedy the allegedly defective condition. To this, Mr. Mynatt also has not responded.

Accordingly, the University is entitled to summary judgment as a matter of law since the University has negated two essential elements of Mr. Mynatt's claim under Tennessee Code Annotated, section 9-8-307(a)(1)(C) and therefore, Mr. Mynatt's claim must be DISMISSED.

The Commission would note further, that based upon the materials now before it, it appears unlikely that had Mr. Mynatt's claim survived summary judgment, he would have been successful at trial. First, the State, like any property owner, is not an insurer of the safety of persons who may enter upon a property or facility which it owns or operates. (See *Byrd v. State*, 905 S.W.2d 195, 197 (Tenn. Ct. App. 1995.)

Secondly, both Tennessee and Federal courts have repeatedly stated that negligence is not presumed from the mere fact of an accident or injury. *Armes v. Hulett*, 843 S.W.2d 427, 432 (Tenn. Ct. App. 1992); cited in *Kellner, et al. v. Budget Car and Truck Rental, Inc., et al.*, 359 F.3d 399, 403 (6<sup>th</sup> Cir. 2004).

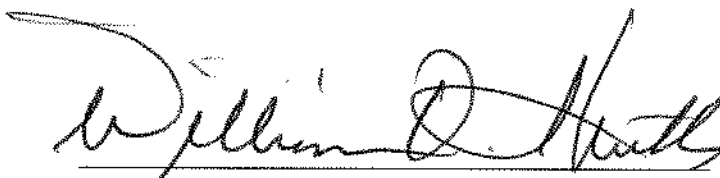
Finally, the doctrine of comparative fault applies in cases such as this. That doctrine was first enunciated in this state in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.) and requires that a claimant or plaintiff prove that his fault in causing his injury, was less than that of the opposing party and perhaps other individuals or entities. Here, Mr. Mynatt had a great deal of responsibility in causing his injury by virtue of the fact that he, along with many others, avoided security personnel in place around the court following the South Carolina victory while attempting to obtain autographs. He also apparently failed to watch where he was walking/running as he attempted to get onto the court after having observed a complete game on that same surface that evening.

Of course, it is unfortunate that this young man was injured. However, the Commission must be guided by the law of negligence as it is applied in cases before the Tennessee Claims Commission. Under the provisions of the Tennessee Claims Commission Act, the University has shown that it is

entitled to summary judgment because this injury was not foreseeable to it and it was not alerted as to what Mr. Mynatt contends was a dangerous condition prior to the event, thus giving it an opportunity to fix the alleged condition before he was injured.

For these reasons, this claim must be and is respectfully **DENIED**. Therefore, the Commission **FINDS** the State's Motion to Dismiss is appropriate and is **GRANTED**. As such, this claim must be **DISMISSED**.

ENTERED this the 25<sup>th</sup> day of January, 2010.



**William O. Shults, Commissioner**

P.O. Box 960

Newport, TN 37822-0960

(423) 613-4809


**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the foregoing document has been forwarded to:

**Jason Mynatt  
1608 LeConte Road  
Knoxville, TN 37914**

**Rhonda Alexander, Esq.  
Office of the General Counsel  
The University of Tennessee  
719 Andy Holt Tower  
Knoxville, TN 37916**

This the 27 day of January, 2010.

  
Clerk